No. 15704

IN THE

United States Court of Appeals

for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,

Appellant,

vs.

LEO TACKE,

Appellee.

APPELLANT'S BRIEF

Appeals from the United States District Court for the District of Montana, Great Falls Division

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Jurisdiction (District Court)

a) Diversity of Citizenship;
Amount in Controversy.

The district court had jurisdiction under Title 28, section 1332 U.S.C.A., this being a civil action where the matter in controversy exceeds the sum of $3,000, exclusive of interest and costs, and is between a citizen of Montana and a subject of a foreign state, to-wit, appellee, plaintiff below, is a citizen of Montana, and appellant is a stock Insurance Company with its United States head office in Los Angeles, California and admitted and authorized to do business in Montana with its principal office in said state in Helena, Montana. Its home office is in Winnipeg, Canada. These facts are pleaded, par. I of the complaint (Tr. p.3) and admitted in the answer (Tr. p. 28, a).

Jurisdiction of Appellate Court

The district court filed his Findings of Fact and conclusions of law 19th of June, 1956 (Tr. 40); filed, entered and noted his judgment the same day (Tr. 42). Motion to Amend Findings of Fact, Conclusions of Law and Judgment under Federal rule 52(b) were served and filed 26th of June, 1952. (Tr. pp. 43 to 46). The Order overruling the Motion was filed 27th of June, 1957, with exceptions allowed (Tr. 47). Supersedeas bond was filed and approved 25th July, 1957. Notice of Appeal under Federal Rule 73(a) was served and filed 25th of July, 1957, (Tr. pp. 48, 49). August 22, 1957, the clerk of the district court certified the

record on appeal. It was filed in the appellate court August 26, 1957 and docketed September 9, 1957, (cf. Fed. Rule 73 (g).

Concise statement of points relied upon by appellant (anew) were served and filed September 9, 1957, in the appellate court.

Appellant, in compliance with Federal Rule 75 (a), duly filed in the appellate court, its designation of contents of the record to be contained in the record on appeal.

Appellee's motion to dismiss the appeal for failure to docket the record within forty days from the date of filing the notice of appeal was argued before the court October 21, 1957, on which day, the court denied the motion, conditional that appellant, within ten days of receipt of a statement of estimated cost of printing the transcript of the record, deposit the total cost with the clerk of the court. This condition was duly and fully complied with. By stipulation of counsel dated January 14th, 1958, and permission of court duly given, time for filing appellant's Brief has been extended to 28th of February, 1958.

STATEMENT OF THE CASE

Plaintiff, (appellee) prays judgment as follows:

1. That the court determine, declare and adjudicate the validity of appellant's automobile liability policy and the liability of the appellant thereunder; that the policy was and is a valid contract of insurance as of 12:01 A.M. September 20, 1952, and that the appel-

lant is liable and obligated in accordance with the terms of the policy.

2. That the court award appellee $3,000.00 attorneys' fees and costs.

3. Equitable relief, (Tr. pp. 11, 12).

The only issue involved in this appeal is whether the policy covers the accident involved in this suit. The policy contains the following provision, (Tr. p. 13):

> "Policy period: From September 20, 1952 to September 20, 1953. (12:01 A.M. Standard time at the address of the named insured as stated herein.)"

The words in parenthesis are a printed part of the policy.

The court's Finding of Fact (Tr. p. 39, (5)) and Conclusion of Law (Tr. p. 40, (2)) is, "That the policy was and is a valid contract of insurance, from 12:01 A.M. September 20, 1952 to 12:01 A.M. December 21, 1952," and the judgment is to the same effect (Tr. p. 42).

Appellee pleaded (Tr. 5, par. VI of Comp.) that appellant did December 10, 1952 give appellee notice of cancellation of the policy effective 12:01 A.M., December 21, 1952 in accordance with paragraph 22 of "Conditions" set forth in the policy, adjusted the premium on a prorata basis, and refunded to appellee his prorated portion. Exhibit "B" (Tr. p. 14) is the notice of Cancellation referred to. Appellant answered this allegation (Tr. p. 28, b. and p. 29, c) that the written application for the policy (Tr. 205)

was made and accepted at the hour of 9:30 A.M. September 20, 1952, when appellant agreed to issue the policy; that the automobile accident referred to in the complaint had occurred about the hour of 8:20 A.M. of September 20, 1952, and appellant, alleges in respect, thereof:

> "Said application was accepted and the promise to issue said policy was made without disclosure of that fact to Bill Kelly Realty (the agent who took the application and issued the policy) and without knowledge on the part of said agency or on the part of the defendant that the accident and consequent loss or damage had already occurred when the promise to issue the policy upon said application was made." (Tr. 28)

As to the notice of cancellation, (Ex. "B" Tr. p. 14) appellant pleads (Tr. 29):

> "That said notice was given to the plaintiff under the belief that the policy of insurance covered any and all losses that might have occurred between the time of the acceptance of the application for said policy September 20th, 1952, at 9:30 A.M. and the date designated for cancellation, and alleges in respect thereof that the defendant notified the plaintiff prior thereto that the policy of insurance did not cover the loss referred to in plaintiff's complaint, and which occurred about 8:20 A.M. the morning of September 20th, 1952."

As an affirmative defense, appellant pleads that the accident occurred approximately 8:20 A.M. September 20th, 1952; that application for the insurance was made to Bill Kelly Realty, appellant's agent, 9:30 A.M. the same day. That the fact that said accident occurred and said damages and losses

had been sustained was, in fact, concealed from said Bill Kelly Realty and the appellant until after the Bill Kelly Realty had accepted the application and agreed to issue the policy and that upon October 27, 1952, appellant gave notice to appellee that his policy was not in effect at the time the loss occurred.

It stands admitted that Pearl Kissee filed her suit against appellee May 22, 1954, for damages sustained in the accident; that appellee requested appellant to defend but on June 11th, 1954, appellant refused to defend the suit and tendered to appellee the remainder of the premium which tender appellee refused.

When Hiram S. Dotson, President of H. S. Dotson Company, appellant's General Agent for Montana (Tr. 188) was on the witness stand, we asked him:

> "When is the first time that you knew or believed that this accident had actually happened before the policy was applied for?" (Tr. 190).

Appellee's counsel objected on the ground we were trying to impeach our own witness (Tr. 190). We assigned our reason for the question and when we got to the case and completed our investigation, we believed that fraud voided the entire contract from the inception and that under the statute to rescind, had sent (to appellee) the rest of the consideration (Tr. 192). We suggested to the court that appellee's report of the accident (Tr. 202, Ex. "12") was that the accident occurred 9:30 in the morning; but the initial setup in Dotson's office was that the loss occurred before nine o'clock; that the developing of

the case was a gradual evolution until we cancelled the contract for fraud from the beginning. The court replied:

> "Well you haven't got any fraud in this case; it isn't set up in the pleadings, either way, there is none here at all."

The court ruled against showing when Dotson's office learned that the accident happened before the policy was applied for (Tr. pp. 190 to 193).

ON THE EVIDENCE

The record from Great Falls City police office (Def's Ex. "16", Tr. p. 211) fixes the time of this accident at approximately 8:20 A.M., September 20, 1952. The report of accident was received at 8:24 A.M. This is not contradicted. A woman telephoned.

Application for this policy was taken in Kelly's office by his employee, Jane Halverson. A woman witness, Hester M. Dusek, testified the accident happened "right on our corner" about 8:30 (Tr. 128). She testified she telephoned appellee's wife about the accident "after 9:00 o'clock" between nine and nine-thirty" (Tr. 130).

Witness Jane Halverson takes applications for insurance, writing on the application the type of insurance they want, the vehicle covered, the time the call comes in (Tr. 163-4). She made out the application for appellee's policy from his wife's telephone to her. (Def. Ex 13, Tr. 164 and 165). The exhibit shows the call came at 9:30 A.M. for "policy period from 9-20-52 to 9-20-53." She testified (Tr. 166):

"We bind coverage by those applications. Sometimes the policy is not written for a day or so even and we don't have time to do everything as it comes in so when the information is put on that form they are covered right at the—"

She testifies that it is customary for customers to ask for insurance on the phone, that in the conversation as to the kind of policy, amount and so forth, she makes out the application sheet (Tr. 166). Mrs. Tacke tried to get the insurance policy "dated" the day before (Tr. 167, 168). Jane Halverson responded, "Have you had an accident" to which Mrs. Tacke replied, "No." Mrs. Halverson testified that appellee came into the office just before noon, and reported that the accident happened about 9:30. The policy had been written (Tr. 169).

Appellee called at adjuster Hirst's office September 24th, 1952 and Hirst's stenographer wrote up appellee's Report of Automobile Accident, (Tr. 202, Exhibit "12").

She asked appellee the questions and he gave the information (Tr. 95). He looked it over when he signed it and knew what was in it. It reads (Tr. 202):

"Date of accident: September 20, 1952. Hour: 9:30 o'clock A.M. Condition of weather: Good."

Appellee's wife spun a nebulous story about conversations she had with several people connected with Kelly's office, and with Kelly, prior to September 20, 1952, which might be construed as evincing a willingness to insure the car in question when appellee got ready. Appellee had another Plymouth, licensed, and

used by appellee and insured in 1952 (Tr. 105). The Plymouth involved in this accident was a total wreck, December, 1951, or January, 1952, which appellee was rebuilding, in his spare time (Tr. 104). Tacke did not have title to the car involved at the time of accident, he got title after the accident. (Tr. 103). Appellee had no use of the car before the accident, it was "practically" repaired. We find no evidence of a contract of insurance, or a contract to insure, prior to September 20th, 1957; nor do the Findings of Fact, or Conclusions of law do so.

SPECIFICATION OF ERRORS

Errors relied upon to supoprt this appeal are:

I

The district court erred in Finding of Fact No. 4 (Tr. 38) that the policy of insurance was effective 12:01 A.M., September 20, 1952, and Finding No. 5 (Tr. 39) that the policy "was and is a valid contract of insurance binding upon the defendant for the period . . . from 12:01 A.M. on September 20, 1952 to 12:01 A.M. December 21, 1952, and the defendant is liable and obligated in accordance with the terms of said policy of insurance for the insured period fixed by the defendant 12:01 A.M. September 20, 1952 to 12:01 A.M. December 21, 1952", the latter date being the date fixed for cancellation of the policy by appellee in the Notice of Cancellation (Tr. 15, Ex. "B" of the Complaint). Also in the conclusion of law (Tr. 40) that the contract of insurance was and

is a valid contract of insurance, from 12:01 A.M. September 20, 1952, and a like judgment (Tr. 42) and in awarding to appellee $1,500.00 attorneys' fees evidently based on the Finding and Conclusion that the policy covered the accident involved.

The foregoing assignment of error is based on (a) the concealment by appellee from appellant of the fact known by appellee, that the accident had occurred prior to acceptance of the application for insurance by appellant, (b) the direct representation by appellee's wife, as an inducement to accept the application, that no accident had occurred, and (c) appellee's statement at noon the day of the accident (Tr. 169) and in his report of the accident that it had occurred at 9:30 o'clock that morning (Tr. 168, Mrs. Halverson's testimony of Mrs. Tacke's denial is not contradicted and Tr. 202 Exhibit "12", being appellee's report of the accident dated two days after the accident, September 24, 1952), and (d) appellant's full faith and confidence in appellee (Tr. 168, 169) and belief that no accident had occurred when the application was accepted and when the policy was delivered.

II

Refusal of the court to amend the Findings, Conclusions, and judgment, raising precisely the points relied upon in assignment I.

III

The court's ruling against appellant's attempt to fix the time when H. S. Dotson Co., appellant's gen-

eral agent in Montana, knew or first learned that the accident had preceded acceptance of the application for the policy. The question propounded to Dotson, the president, was:

> "When is the first time that you knew or believed that this accident had actually happened before the policy was applied for?" (Tr. 190).

This question was strongly objected to, when appellant's counsel stated the purpose of the question as follows:

> "Under the terms of the policy and later when we got to the case and completed our investigation we tendered the whole premium back on the ground we believed that fraud voided the entire contract from the inception and that under the statute to rescind had sent the rest of the consideration."

And on page 193 of the Transcript, the record reads:

> "If I may just make this additional remark, please. This case was set up in Mr. Dotson's office by this report of the accident signed by Tacke that the loss occurred at 9:30 in the morning, and the initial setup of this case in his office was that loss occurred before nine o'clock, and it is a gradual evolution and investigation and discovery of new evidence which finally by the time we wrote the letter cancelling, that it be cancelled for fraud from the beginning, those facts were a little bit slow in accumulation."

Mr. Dotson was not permitted to answer.

ARGUMENT

Our conclusion is that the uncontroverted facts shown in our statement of the case, brings the instant case within the rule stated by the Supreme Court of

Pennsylvania in Barry et ux vs. Aetna Ins. Co. 81 Atl. 2d 551, to-wit:

> "Where a loss, occurring before the risk attaches, is known only to the applicant and he obtains a policy without disclosing the fact of the loss, the policy is void even though the contract be given a date prior to the loss."

At least, that particular risk is not covered.

Pearl Kissee, in her verified complaint against appellee (Tr. 16) claims $5,205.45 damages arising out of this accident. Appellee's complaint herein invokes the jurisdiction of this court upon the allegation that the amount involved herein "exclusive of interest" exceeds the sum of $5,000.00 (Tr. 3). Appellee, when he applied to Kelly for this policy, tried and now tries, to force appellant to pay in excess of 5,000.00 for a $39.00 insurance premium on a policy appellee applied for and got with knowledge of the true facts, to-wit: That he tried, and continues to try, to foist a loss which he already had incurred, amounting to in excess of $5,000.00 in consideration of the paltry sum of $39.00 which he paid appellant for the policy. By his fraudulent acts in concealing the prior loss and positive representations, first that the loss had not yet occurred and, near the time of the accident, that it actually occurred at 9:30 A.M., he raised a justiciable issue, and seeks further advantage in the fact that Kelly kept his word, given in good faith, issued the policy and mailed it out after the loss occurred. Mrs. Halverson was suspicious, told Kelly, and asked him:

"Do you think they had an accident."

Mr. Kelly replied:

"Of course not, they wouldn't do a thing like that." (Tr. 168, 169.)

So she wrote the policy under her superior's directions (Tr. 169).

Seven Appleman, "Insurance Law and Practice," sec. 4265, states the rule of law as follows:

"Generally, a policy of liability insurance does not cover an accident occurring before its issuance, even though the loss occurs in the interval between the application for the policy and its issuance."

"If the insured has knowledge of a loss at the time an application for insurance is made, and he conceals such fact, the policy has no force as a binding contract."

In Hansen vs. Cont. Cas. Co., (Wn.) 287 Pac. 894, McNally, a free-lance broker, applied for an accident policy September 9, 1927, and paid part of the premium. Policy was executed September 12th and dated back to September 9th. The accident occurred September 10th and verdict and judgment were given for the plaintiff. On appeal, Chief Justice Mitchell, in writing the opinion, reversing the judgment and remanding the cause with instructions to enter judgment for appellant, notwithstanding the verdict, said:

"Appellant's contention, which we think must be sustained, is that respondent's agent McNally, in procuring the predating of this policy so that on its face it covered a date on which an accident had already occurred, known to respondent's agent, but entirely unknown to the appellant and its agent,

was guilty of conduct that voided the policy as to any liability for such injuries."

Section 40-301, Montana R. C., provides:

"CONCEALMENT, WHAT CONSTITUTES. A neglect to communicate that which a party knows, and ought to communicate, is called a concealment."

Section 40-302, R. C. M., 1947, provides:

WHAT MUST BE DISCLOSED. Each party to a contract of insurance must communicate to the other, in good faith, all the facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty."

Section 40-303, R.C.M. 1947, provides:

WHAT MUST BE DISCLOSED. Each party to a contract of insurance must communicate to the other, in good faith, all the facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty."

Section 40-305, R. C. M., 1947, provides:

"TEST OF MATERIALITY. Materiality is to be determined not by the event, but soley by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

Section 2-113 of our Codes provides:

"Agent cannot have authority to defraud principal. An agent can never have authority, either actual or ostensible, to do an act which is, and is known

or suspected by the person with whom he deals, to be a fraud upon the principal."

The legislature is quite as sensitive on the issue as the courts.

In Western Indemnity Co. v. Ind. Accident Gd., 190 Pac. 27, the Supreme Court of California follows the Montana Supreme Court in holding that a general insurance agent has no authority to insure against loss or destruction of property occurring before the contract of insurance is made. The court said:

> "Whether or not the insurer, under all the circumstances, could have issued a policy which covered the loss—either total or partial—the authorities we have cited sustain the proposition that, unless there is a subsisting contract of insurance when the loss occurs, a general agent, in the absence of express authority, has no power to issue a policy. We think it has been made clear that in this case there was no contract in force at the time of the injury . . . No authority has been cited, and we are aware of none, holding that a general agent, unless specially authorized, may issue a policy for a known loss, where the terms of the contract of insurance had not already been settled upon."

In Strangio, et al. v. Consolidated Indemnity Co., 66 Fed. 2d. 330, the Circuit Court of Appeals, Ninth Circuit, the automobile, with the knowledge of applicant for liability insurance, was involved in an accident between date of application and issuance of the policy, which antedated the accident and the court held that the insurer was entitled to cancellation of the policy. Strangio Bros. were the applicants for insurance. As to the effect of antedating the policy

to include a loss **occurring before the policy issued but after the application for the policy, the court said:**

> "The policy covers only liabilities that were unknown to Strangio Bros. at the time the application for insurance was accepted and the policy was issued. If an accident had occurred between the date that Strangio Bros. applied for the insurance and the date of the issuance of the policy, without the knowledge of Strangio Bros., the policy having been made effective prior to the accident, the policy would have taken effect by relation as of the 18th. Under the California statute, quoted above, the failure to disclose to the insurer that an accident had happened authorized the cancellation of the policy, notwithstanding the fact that Strangio Bros. were not guilty of any intentional wrong in not making the disclosure to the insurance company before the policy was issued."

The following cases accord with the decisions that an agent had no authority to insure property already destroyed or liability for loss already sustained:

Stipich vs. Metropolitan Life Ins. Co.
277 U. S. 311, 72 L. Ed. 895 (life policy)

Strangio vs. Consolidated Ind. Co. (C. C. A. 9th)
66 Fed. 2d 330

Harrison State Bank vs. U. S. Fidel. & Guar. Co.,
(Mont.) 22 Pac. 2d, 1061; and

Royal Indemnity Co. vs. May & Ball (Ky.)
300 S. W. 237

Gandelman v. Merc. Ins. Co.,
90 Fed. Suppa. 472

Mass. Mut. Life v. Cohen
70 Fed. S. 186 (Life)

Royal Ins. Co. v. Smith
77 Fed. 2d. 157

Barry v. Aetna Ins. Co. (Pa.)
81 Atl. 2d. 551 (policy void from inception)

Moffett v. Tex. Emp. Ins. Ass'n (Tex. Civ. App.)
217 S. W. 2d. 142

Trinity Uni. Ins. Co. v. Rogers (Tex. Civ. App.)
215 S. W. 2d. 349

Mass. Bond & Ins. Co. v. Hoxie (Fla.)
176 So. 480

Celina Mut. Cas. Co. v. Baldridge (Ind.)
10 N. E. 2d. 904, rehearing denied,
12 N. E. 2d. 258 (Auto. liability ins.)

Millar v. New Amsterdam Cas. Co.
289 N. Y. S. 599 (auto. lia.)

O. M. Gaudy, Inc. v. N. C. Home Ins. Co. (Wash.)
260 Pac. 257 (theft, auto policy)

Hansen v. Cont. Cas. Co. (Wn.)
287 Pac. 894, supra

Sholunc v. Detroit Fire & Marine Ins. Co. (Wn.)
19 Pac. 2d. 395 (fire)

Mallard v. Hdwr. Indem. Ins. Co. (Tex. Civ. App.)
216 S. W. 2d. 263

In Trinity Universal Ins. Co. vs. Rodgers, (Tex), 215 S. W. 2d. 349, the facts were similar to the instant case. The accident occurred November 11th and November 13th insured had his wife call the insurance agent, resulting in validating a renewal automobile liability policy by a false entry on the agents books, charging the premium. The Texas Court of Civil Appeals says:

"It is well settled, we think, in this State as well, as the country over, that a policy issued after the loss is sustained is invalid and under such circum-

stances an agent would be powerless to issue a policy or enter into an insurance contract binding upon his principal."

Mass. Bond & Ins. Co. vs. Hoxie (Fla.), 176 So. at p. 482, the court quotes Joyce on Ins. (1st Ed.) Vol. 1 p. 159, sec. 99:

"If the delivery be obtained by misrepresentation or fraud, it can have no effect as a binding contract as in case the assured has knowledge of the loss at the time the application is made and conceals the fact."

Millar vs. New Amsterdam Co., 289 N. Y. S. 599:

"An acceptance of the policy under such circumstances would be a fraud upon the defendant and . . . the contract was obviously void."

In Mallard vs. Hdwe. Indemnity Ins. Co. 216 S. W. 2d. 263, Texas Court of Civil Appeals, in considering automobile collision upset policy follows the decision and applies the rules set forth in Alliance Insurance Co. vs. Continental Gen. Co., Tex. Comm. App., which involved fire insurance loss. Both cases adopt the rule:

"If the insurer acts in good faith, but the insured knows of the previous destruction, there is present avoiding fraud." . . .

"A fortiori, ratification (rather adoption) after destruction" is contary to public policy and cannot be enforced.

The Texas Court cites Kline Bros. & Co. vs. Royal Ins. Co. 192 Fed. 378, where Judge Hand says, considering a fire policy:

"The policy at its inception, must be construed as an insurance of a risk, not as a certain agreement

to pay for otherwise, as I have said, the contract becomes absurd."

And in M. F. A. Mut. Ins. Co. vs. Quinn, 259 S. W. 2d. 854, the Kansas City Court of Appeal follows the Mallard case in an automobile policy, and says:

"The general rule is that the property must be in existence when the risk attaches, or the policy is void."

We respectfully submit that on the general issue, the decision should be that the policy of insurance did not cover the damages claimed by the appellee arising out of the accident, about 8:20 A.M. September 20 1952, and that the claim of the appellee for attorneys' fees should be denied, with costs to appellant.

Respectfully Submitted,

HOFFMAN & CURE

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Service of the foregoing Appellant's Brief and receipt of three copies thereof is hereby admitted this ..... day of February, 1958.

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